LIBRARY
SUPREME COURT, U. S.

FILED
SEP 28 1970
ER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 766

RICHARD C. TURNER, Attorney General of Iowa; DOUGLAS CARLSON, Assistant Attorney General; ROBERT C. BLAIR, Director, Iowa Bureau of Criminal Investigation; DANIEL MAYER, TERRY C. JOHNSON, Agents,

Petitioners,

v.

HENRY WILHELM and LAWRENCE FRANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RICHARD C. TURNER
Attorney General of Iowa
State House
Des Moines, Iowa 50319

DAVID A. ELDERKIN
Special Assistant Attorney General
State House
Des Moines, Iowa 50319

Counsel for Petitioners

Washington, D. C. West Publishing Co.

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
1. The Decision Below Conflicts with the Decisions of Other Courts of Appeals on the Question of Violation of a Bailee's Fourth Amendment Rights	6
2. The Decision Below Raises Significant and Recurring Problems Concerning Efforts by Law Enforcement Officers To Obtain Evidentiary Materials	11
CONCLUSION	12
APPENDIX A (Opinion and Judgment of District Court)	A-1
APPENDIX B (Opinion and Judgment of Court of Appeals)	B-1

TABLE OF AUTHORITIES

Cases:

Davis v. United States, 413 F.2d 1226 (C.A. 5)	7
Quantity of Books v. Kansas, 378 U.S. 205	6
Sartin v. United States, 303 F.2d 859 (C.A. 9)	10
United States v. Eldridge, 302 F.2d 463 (C.A. 4)	9
United States v. Haden, 397 F.2d 460 (C.A. 7)	8
United States v. Mazzella, 295 F.Supp. 1033 (S.D. N.Y.)	9-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

RICHARD C. TURNER, Attorney General of Iowa; DOUGLAS CARLSON, Assistant Attorney General; ROBERT C. BLAIR, Director, Iowa Bureau of Criminal Investigation; DANIEL MAYER, TERRY C. JOHNSON, Agents,

Petitioners,

v.

HENRY WILHELM and LAWRENCE FRANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United State Court of Appeals for the Eighth Circuit entered in the above-entitled case on June 8, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix B hereto. The opinion of the United States District Court for the Southern District of Iowa is reported at 298 F.Supp. 1335. It is set forth in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 8, 1970. A timely petition for rehearing *en banc* was denied on June 30, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether an individual's reasonable expectations of privacy are violated by a bailee voluntarily giving that individual's bailed property to law enforcement officers pursuant to a prior arrangement between itself and said officers such as to constitute a "seizure" within the meaning of the Fourth Amendment.

CONSTITUTIONAL PROVISION

The constitutional provision involved is the Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In the fall of 1968, Iowa Attorney General Richard C. Turner became aware of a newspaper-type publication entitled "Pterodactyl" which was being distributed to minors and which, in his judgment, was becoming progressively more obscene with each issue. Said newspaper was being published by various students and so-called non-students at Grinnell College in Grinnell, Iowa.

Expecting that the next issue of the paper "would really be the bell ringer of them all," Attorney General Turner in early March of 1969 ordered two of his assistants to contact a Mr. Harold Saylor, whose printing company had printed previous issues of the newspaper, for information regarding those issues. They requested that Mr. Saylor notify them the next time he was to publish an issue of the newspaper. Saylor replied at this time that he would cooperate in this regard if his attorney said it was legal and that he would let them know. On March 7, 1969, a Mr. John Stevens, the attorney for the printer, telephoned the Attorney General and informed him that copy for another issue of the "Pterodactyl" would be delivered to the printer on March 13, 1969, and that the printer would voluntarily give such copy to the Attorney General's representatives.

Attorney General Turner then directed an assistant to contact the Iowa Bureau of Criminal Investigation and request that agents thereof be present at the time that the copy was brought to the printer and receive the same from him. Pursuant to said request, three agents of the Bureau met with Mr. Saylor on March 12, 1969. It was decided at that time that when the printer gave the materials to one of the agents they would immediately be taken by him to Des Moines while the other two agents would remain at the printers to explain the circumstances to the respondents. Attorney Stevens was present at all times and at no time

was there any intimidation, promises or threats of any kind on the part of the law enforcement officials.

At approximately 9:30 a.m., on March 13, 1969, the copy materials were delivered to the printer by the respondents. Shortly thereafter the printer gave it to the agents, who, pursuant to the prearrangement took it to Bureau of Criminal Investigation headquarters in Des Moines. The remaining two agents stayed at the printers and later that morning informed the respondents what had happened to the materials. One of the respondents then called the Attorney General's Office but did not ask for return of the materials.

On March 17, 1969, respondents commenced an action in the United States District Court, Southern District of Iowa, under 42 U.S.C. § 1983, requesting an injunction compelling the return of their copy materials which, *inter alia*, had been allegedly "illegally seized" by petitioners. In a separate division of their Complaint, respondents further sought compensatory and exemplary damages from petitioners. On March 18, 1969, petitioners filed a Motion to Dismiss respondents' Complaint, supported by affidavits. A hearing was held before District Court Judge Roy L. Stephenson on March 25, 1969, and evidence was taken in connection with respondents' request for injunctive relief and petitioners' Motion, which was treated as a motion for summary judgment.

On April 23, 1969, the Court filed a Memorandum and Order, holding that the materials in question had been "seized" without a prior judicial determination as to their obscenity and ordering that the same be immediately returned to the respondents. The Court further held that Attorney General Turner and his staff had acted within their jurisdiction and thus were immune from suit. As the other petitioners were performing ministerial functions under the direction of Turner, the Court also found that they, too, were immune from suit. Accordingly, the

division of respondents' Complaint seeking damages was dismissed.

On May 2, 1969, petitioners filed a Motion to Amend Findings with the District Court requesting that that portion of the Court's Memorandum and Order holding that the materials were seized be deleted, *inter alia*, because "no evidence appeared that there was a search, a seizure, or an *unreasonable* search or seizure." Said Motion was overruled by the Court on May 15, 1969. Respondents filed notices of appeal to the United States Court of Appeals for the Eighth Circuit on May 6, 1969, and May 27, 1969. Petitioners filed Notice of Appeal on June 6, 1969.

After oral arguments by both parties, the Court of Appeals on June 8, 1970 handed down its decision holding, *inter alia*, that "the warrantless but voluntary arrangement for procuring the copy constituted a seizure" since there was no prior adversary determination of the obscenity of the same. The Court went on to affirm the judgment of the District Court in all respects. On June 17, 1970, petitioners filed a Petition for Rehearing In Banc from that portion of the Court's decision dealing with the alleged "seizure" of the copy materials, requesting that the same be reconsidered in light of "the far reaching consequences this case will have to criminal investigation generally." The petition was denied on June 30, 1970.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE QUESTION OF VIOLATION OF A BAILOR'S FOURTH AMENDMENT RIGHTS.

Certiorari is being sought seeking review by this Court of that portion of the decision of the United States Court of Appeals for the Eighth Circuit holding that "the warrantless but voluntary arrangement for procuring the copy constituted a seizure." This ruling, applying *Quantity of Books v. Kansas*, 378 U.S. 205, a case having no bearing upon the Fourth Amendment issue,[1] upheld the prior decision of the United States District Court for the Southern District of Iowa, which held only that "the materials were seized," with little or no reasoning. We believe that the basic issue presented—the extent to which a bailee may voluntarily cooperate with law enforcement officers concerning his bailor's bailed property without violating the bailor's Fourth

---

[1] *Quantity of Books v. Kansas*, *supra*, holds only that books cannot be seized by law enforcement officials even on warrant and notwithstanding their obscenity without a prior adjudication as to that obscenity. It clearly does not hold that obscene written material may not be retained and used in evidence, without a prior adjudication of obscenity, if it comes into law enforcement's hands other than by seizure. Attorney General Turner testified that he did not believe that there would have been a right to seize the newspaper copy involved here without such a prior adjudication. But he stated that there was no seizure as the newspaper copy was voluntarily delivered to the law enforcement agents by the bailee printer in rightful possession of it. Thus, as *Quantity of Books* is applicable if there is a seizure, but not otherwise, it can only have application in the instant case subsequent to a determination as to the respondents' Fourth Amendment rights. Any prior application of the case would clearly be begging the question of whether or not there was an unreasonable "seizure." It has been our position in both the District Court and the Court of Appeals, of course, that the respondents' right to privacy was not violated and that, therefore, the case is not relevant at any time.

Amendment rights—is an unresolved and increasingly important one, particularly in light of recent greatly expanded trafficing in drugs and pornographic materials.

We would submit that a directly analogous situation is presented where the government "arranges" with an informant to listen on the informant's extension telephone and tape record the informant's call to defendant (or vice versa), for the express purpose of obtaining incriminating evidence. In *Davis v. United States*, 413 F.2d 1226, a recent decision of the Court of Appeals for the Fifth Circuit, the defendant sought to suppress such a recording made by the government from an informant's extension while the informant called the defendant. Was this an illegal search? The Court stated (413 F.2d at 1232-33):

> "The admissibility of the recordings under the Fourth Amendment follows from this court's decision in Koran v. United States, 5th Cir. 1969, 408 F.2d 1321 . . . . We there recognized that the Supreme Court's holding in Katz v. United States, 389 U.S. 346, 351, 88 S.Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967), that 'the Fourth Amendment protects people, not places' shifts the focus of the Fourth Amendment from 'protected areas' to the individual's expectations of privacy. *Whether the government's activity is considered a 'search' depends upon whether the individual's reasonable expectations of privacy are disturbed.* Just as no 'search' occurs in the observation of items left in 'open view' or an undercover agent's participation in conversations or an informant's carrying of a recording device on his person, no 'search' occurred in the recording of the defendant's telephone conversation . . . . *'Davis' reasonable expectations of privacy were not violated, since he 'knowingly took the risk that his conversants might expose his statements.'* Koran v. United States, *supra.* Since no search occurred, no warrant was necessary, and the court properly denied the defendant's motion to suppress." [Emphasis added.]

In *United States v. Haden*, 397 F.2d 460, a case involving a factual situation basically quite similar to the instant case, a government agent had gotten the confidence of the defendant, a man suspected of certain narcotics violations. At a meeting of the two, the defendant told the agent to go into his (defendant's) automobile, reach under the floor mat and take a package of drugs that had been placed there. The agent did so and defendant was later arrested and convicted because of the contents of the package. The defendant contended to the Court of Appeals for the Seventh Circuit upon appeal from said conviction that the taking of the package from the car was an illegal search and seizure and that his apparent consent to the search was vitiated by the trickery and deceit employed by the agent. In rejecting the contention, the Court stated (397 F.2d at 464-65):

> "[Lewis v. United States, 385 U.S. 206; Hoffa v. United States, 385 U.S. 293; and Lopez v. United States, 373 U.S. 427] clearly indicated that the Fourth Amendment affords no protection to the person who voluntarily reveals incriminating evidence to one who is a government agent in the mistaken belief that the latter will not disclose it. One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from government intrusion unauthorized by warrant or well-defined special circumstances. Cf. Katz v. United States, 389 U.S. 347, 88 S.Ct. 2258 (1967). But he is not protected from the consequences of error if he places trust in the silence, duplicity or complicity of a government agent or informer. Neither is he protected from the consequences of error if he places physical evidence in plain view of government agents. [Citation omitted.]
>
> "Applying these principles to the instant case, we conclude that the Fourth Amendment was not violated. Appellant voluntarily revealed and surrendered the morphine sulphate tablets to the Gov-

> ernment when he instructed its undercover agent to take them from his car. The agent violated only appellant's misplaced confidence. He did not conduct a search of appellant's car nor did he seize the tablets."

The Court of Appeals for the Fourth Circuit has also seemingly held contrary to the Eighth Circuit in *United States v. Eldridge*, 302 F.2d 463. There, the defendant had gratuitously bailed his automobile to a friend for a short period of time. While the car was in the bailee's possession, the bailee gave his consent to a search of the vehicle by law enforcement agents. The Court held that defendant's Fourth Amendment rights were not violated, stating (302 F.2d at 466):

> "[F]or the time being Nethercott was clothed with rightful possession and control and could do in respect to the automobile whatever was reasonable and not inconsistent with its entrustment to him. No restriction was imposed on him except to return with the car by a certain hour. Although the defendant knew of the presence of the stolen radios in the trunk, he apparently did not think it worthwhile to take the precaution of forbidding his bailee to open the trunk or permit anyone to look into it. He reserved no exclusive right to privacy in respect to the trunk when he delivered the key. . . .
>
> * * *
>
> "Conscious of our duty to maintain jealously the constitutional standards of the Fourth Amendment in criminal prosecutions, and to be on guard against the excesses of overzealous officers, we nevertheless must recognize that some searches may be eminently reasonable as not to fall under the interdict of the Amendment. Upon consideration of the circumstances we conclude that the bailee's consent made this a reasonable search."

It might be noted that the *Eldridge* decision has been held to be controlling by the District Court for the Southern District of New York in the quite similar case of *United*

States v. Mazzella, 295 F.Supp. 1033, wherein it was held that a bailee in possession of a truck had authority to consent to a search of the truck.

In *Sartin v. United States*, 303 F.2d 859, the defendant had left a locked briefcase and a key in the home of a friend named Zucker. After reading of defendant's arrest on a narcotics charge, Zucker had the briefcase delivered to an attorney who turned it over to the police. A large quantity of heroin was discovered inside. The Court of Appeals for the Ninth Circuit held that the search of the briefcase was reasonable because the defendant had voluntarily surrendered "to a large degree his right of privacy" by delivering the briefcase and means of access to it to another.

It is obviously horn-book law that the Fourth Amendment prohibits only unreasonable seizures—only unreasonable invasions of one's privacy. Each of the above-cited decisions as well as the case at bar involved what could reasonably be described as a bailor-bailee relationship in regard to certain property, tangible or intangible. In each case the bailor voluntarily gave away possession of that property with no restrictions upon the use of the same—no reservation of an "exclusive right to privacy"—thus "taking the risk" that the bailee might give away possession thereof. In each it is clear that the bailor was relying upon a "misplaced confidence" that the bailee would not give up possession of his bailed property to law enforcement agents and thus reveal his wrongdoing. However, in the cited cases the Fourth, Fifth, Seventh and Ninth Circuits held that no unreasonable "seizure" of the bailed property had taken place; in the instant case, the Eighth Circuit, totally ignoring the decisions of their fellow Courts of Appeals, held that there had been an illegal seizure by petitioners of respondents' newspaper copy materials. There is now, then, a definite and decided split between the Courts of Appeals on this important issue which we believe should and must be reconciled.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS BY LAW ENFORCEMENT OFFICERS TO OBTAIN EVIDENTIARY MATERIALS.

The issue in the instant case is one of exceptional importance because the decision of the Court of Appeals appears to extend the Fourth Amendment far beyond its historic purpose and, without coming to grips with the problem, apparently eliminates another common and fundamental method of obtaining evidence in criminal cases. Moreover, as previously stated, the issue is one that is likely to arise again in all areas of criminal law, not just obscenity cases, with serious adverse consequences to justice and the public. It is hard for us to believe that the courts could frown upon law enforcement officers receiving evidence from a bailee who has voluntarily contacted those officers and given them the evidence. Surely the courts do not intend law enforcement officers to return, for example, a murder weapon that the murderer has given to someone for safekeeping, who then turns the weapon over to them. To so hold would not only greatly impair law enforcement activities, it would in no way protect the bailor's *reasonable* expectations of privacy protected by the Fourth Amendment. But, this is exactly what the Eighth Circuit has done.

CONCLUSION

For these reasons, a writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted.

RICHARD C. TURNER
Attorney General of Iowa

DAVID A. ELDERKIN
Special Assistant Attorney General
State House
Des Moines, Iowa 50319
Attorneys for Petitioners

Date – September 1970

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

HENRY WILHELM and LAWRENCE FRANK,
Plaintiffs,

v.

Civil No. 8-2335-C-2

RICHARD C. TURNER, Attorney General of Iowa; DOUGLAS CARLSON, Assistant Attorney General; ROBERT C. BLAIR, Director, Iowa Bureau of Criminal Investigation, DANIEL MAYER, TERRY C. JOHNSON, Agents,
Defendants.

MEMORANDUM AND ORDER

Plaintiffs filed complaint herein alleging that the defendants "acting under color of state statute, illegally seized printed material belonging to plaintiffs, to wit, printed copy of the newspaper Pterodactyl, which material is an exercise of plaintiffs' right to freedom of speech and press." Plaintiffs further allege that "the seizure was without warrant and without prior adversary adjudication of obscenity, violated plaintiffs' rights by Amendments One and Fourteen of the United States Constitution, and has caused and will continue to cause plaintiffs irreparable harm." Plaintiffs pray for an injunction restraining defendants from further seizure of printed material belonging to plaintiffs in violation of their constitutional rights and for a preliminary injunction ordering defendants to return to plaintiffs all the items seized by defendants. In Count II, plaintiffs further allege that the illegal seizure resulted in plaintiffs' inability

to make timely publication of the newspaper and that defendants' seizure was made because of malice toward plaintiffs. Plaintiffs pray for one thousand dollars ($1,000) actual compensatory damages and ten thousand dollars ($10,000) punitive damages.

Defendants filed motion to dismiss on the grounds that the Court lacks jurisdiction of the subject matter, Fed. R. Civ. P. 12b(1), and that the complaint fails to state a claim upon which relief can be granted, Fed. R. Civ. P. 12b(6). Defendants filed supplements to their motion in the form of affidavits by the Attorney General and other members of his staff named as defendants, and members of the Iowa State Bureau of Criminal Investigation, also named as defendants. The Court treated the motion to dismiss for failure to state a claim upon which relief can be granted as a motion for summary judgment, Fed. R. Civ. P. 56. Oral hearing was had and evidence taken on plaintiffs' prayer for preliminary injunction, and in connection with the motion for summary judgment.

This Court has jurisdiction of the parties and the subject matter under the provisions of Title 28 U.S.C. § 1343; Title 42 U.S.C. § 1983.

The pleadings, affidavits, and evidence offered indicate the matters hereinafter set out, occurred. The plaintiffs brought certain materials to Trico Publishers at Wilton Junction, Iowa, for the purpose of having them printed as a newspaper called "Pterodactyl" on March 13, 1969. Trico had previously printed two issues of the newspaper for plaintiff Wilhelm. Prior arrangements had been made for the printing on March 13. Four thousand issues were to be printed and ultimately sold in the vicinity of Grinnell College. Shortly after their delivery to the printer the materials were turned over to agents of the State Bureau of Criminal Investigation by the printer pursuant to a prior arrangement between the Attorney General and the attorney for the printer. Plaintiffs' request for return of the materials was not granted and ultimately the materials were

brought to the state capitol where they remained in the custody of the State Bureau of Criminal Investigation until brought into court at the hearing herein.

It is undisputed that no warrant for the seizure of the materials was ever sought or issued. Neither was there any hearing for the purpose of determining whether the material was obscene. It is the position of the Attorney General that the materials were voluntarily turned over to his representatives by the printer and thus there was no seizure. He further contends that based on examination of prior issues of the paper furnished to him there was good reason to believe these materials would be obscene and if found to be so, they were subject to retention as contraband. The Court does not agree with either of these propositions.

The Court finds that the materials were seized by agents of the Attorney General at his direction without a prior judicial determination as to their obscenity. In *A Quantity of Books, et al. v. Kansas*, 378 U.S. 205 (1963), the Supreme Court of the United States has ruled that an adversary determination of obscenity is a necessary prerequisite to seizure. It is not the purpose of the law to permit the dissemination of obscene materials but to prevent the abridgment of the right in a free society to unobstructed circulation of non-obscene materials. It is of no consequence that such materials are now alleged to be contraband.[1] It is their seizure without a prior judicial determination of obscenity that the law forbids.

Defendants suggest that appropriate remedies are available under state law and therefore this Court should abstain from further action pending possible proceedings in the state courts. The remedy available under federal law is supplementary to the state remedy, and state action need not be first sought and refused before the federal one is

---

[1]The Court does not disagree with the Attorney General's description of the material as trash.

invoked. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). It is also clear that the federal court has the power to grant injunctive relief to protect the violation of a constitutionally protected right. *Dombrowski v. Pfister*, 380 U.S. 479, 497-98 (1965); *Potwora v. Dillon*, 386 F.2d 74 (2d Cir. 1967). Plaintiffs are entitled to a prompt return of their materials and it will be so ordered. It does not now appear that a preliminary injunction is needed to prevent further seizure of plaintiffs' property by the defendants. State action has not been instituted against the plaintiffs. Neither have any further attempts been made to seize materials from the plaintiffs. Under these circumstances a preliminary injunction does not now appear necessary and will therefore not be ordered.

Under Count II of their complaint plaintiffs seek compensatory and punitive damages on account of the illegal seizure of their materials. Defendants seek dismissal of this claim on the grounds that the Attorney General was acting in a quasi-judicial capacity and within the authority and jurisdiction of his office and therefore is immune from suit for civil damages. It is further urged that his staff and the members of the State Bureau of Criminal Investigation were acting at the Attorney General's direction and therefore likewise immune from civil action for damages.

The doctrine of judicial immunity has long existed under our law. *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1871), and it has recently been affirmed that this doctrine was not abolished by Title 42 § 1983. *Pierson v. Ray*, 386 U.S. 547, 554 (1966); *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955). The doctrine recognizes that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." 13 Wall. at 347.

The doctrine of judicial immunity has also been applied to prosecuting attorneys and those associated with them in

the discharge of their duties on the basis that they are quasi-judicial officers and should be afforded the same immunity in order that they may act freely and fearlessly in the discharge of their important official functions. *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949). It has likewise been held that the doctrine of immunity of quasi-judicial officers such as prosecuting attorneys has not been modified by the civil rights statute, Title 42 § 1983. *Rhodes v. Meyer*, 334 F.2d 709, 718 (8th Cir. 1964), *cert. denied*, 379 U.S. 915; *Rhodes v. Houston*, 202 F.Supp. 624, 633-34 (D. Neb. 1962), *aff'd*, 309 F.2d 959 (8th Cir. 1962); *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963); *Wise v. City of Chicago*, 308 F.2d 364 (7th Cir. 1962); *Phillips v. Nash*, 311 F.2d 513 (7th Cir. 1962); *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966); *Fanale v. Sheehy*, 385 F.2d 866 (2d Cir. 1967); *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961).

Plaintiffs contend that the defendants, Richard Turner, Attorney General, and Douglas Carlson, Assistant Attorney General, were acting in an investigatory capacity and not in their quasi-judicial capacities and are therefore not immune from prosecution under the Civil Rights Act, Title 42 § 1983. *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965); *Dodd v. Spokane County, Washington*, 393 F.2d 330 (9th Cir. 1968). Defendants on the other hand urge that the Attorney General and his assistant were acting within the jurisdiction and authority conferred by statute upon the Attorney General. Section 13.2(2), Code of Iowa 1966, provides in part as follows:

> "It shall be the duty of the attorney general, except as otherwise provided by law to:
>
> "2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, * * *."

Chapter 725, Code of Iowa 1966, makes it a criminal

offense to print, publish, sell, or distribute obscene material. The Attorney General and his staff must of necessity conduct investigations in carrying out their official duties. The Court now finds that they were acting within their jurisdiction in conducting the investigation in the case at hand. It is only when the Attorney General or his staff act clearly outside their jurisdiction that they lose their immunity. *Bauers v. Heisel, supra* at 590-91. The claim for damages against the defendant Attorney General and his assistant will, therefore, be dismissed.

Finally, plaintiffs urge that no judicial immunity extends to deprive this court of its jurisdiction to grant recovery as to defendants, Robert C. Blair, Daniel Mayer, and Terry C. Johnson, who in this case were acting as police officers. Defendants contend that they were performing ministerial duties at the direction of the Attorney General (see affidavit of the Attorney General filed herein), and are therefore immune to suit for civil damages. It is clear that the common law has never granted police officers an absolute and unqualified immunity. It is also clear that the defense of good faith and probable cause is available to them in an action under Title 42 § 1983. *Pierson v. Ray, supra,* at 555 and 557. The Court is satisfied in the case at hand that the defendants, members of the State Bureau of Criminal Investigation, were performing ministerial functions at the specific direction of the Attorney General and are therefore immune from suit for civil damages. See *Norton v. McShane,* 332 F.2d 855, 861 (5th Cir. 1964).

ORDER

* * *

IT IS FURTHER ORDERED that plaintiffs' prayer for injunction restraining defendants from further seizure of printed materials belonging to plaintiffs is now denied.

IT IS FURTHER ORDERED that Count II of plaintiffs' complaint seeking compensatory and punitive damages against all defendants is hereby dismissed. Costs are assessed to defendants.

Jurisdiction is retained pending report of compliance with the order herein.

Dated this 22nd day of April, 1969.

/s/ Roy L. Stephenson
CHIEF JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,792

HENRY WILHELM and LAWRENCE FRANK,
Appellants,

v.

RICHARD C. TURNER, Attorney General of Iowa;
DOUGLAS CARLSON, Assistant Attorney General;
ROBERT C. BLAIR, Director, Iowa Bureau of Criminal Investigation;
DANIEL MAYER and TERRY C. JOHNSON, Agents,
Appellees.

Appeals from the United States District Court for the Southern District of Iowa.

No. 19,796

HENRY WILHELM and LAWRENCE FRANK,
Appellees,

v.

RICHARD C. TURNER, Attorney General of Iowa;
DOUGLAS CARLSON, Assistant Attorney General;
ROBERT C. BLAIR, Director, Iowa Bureau of Criminal Investigation;
DANIEL MAYER and TERRY C. JOHNSON, Agents,
Appellants.

Before BLACKMUN, MEHAFFY and BRIGHT, Circuit Judges.

MEHAFFY, Circuit Judge.

Plaintiffs Henry Wilhelm and Lawrence Frank were the publishers of a newspaper, the "Pterodactyl," which was published at irregular intervals for primary distribution on the campus of Grinnell College and in the vicinity thereof. Frank was a junior at Grinnell and Wilhelm was a former student who dropped out of Grinnell about a year and a half prior to this action.

Plaintiffs brought this action under 42 U.S.C. § 1983, seeking an injunction to compel the return of the March 13, 1969 copy of the newspaper and other materials which they alleged had been illegally seized by the Attorney General and other defendants, and they also sought compensatory and exemplary damages. The Iowa Attorney General, Richard C. Turner, had had complaints about the publication and had examined several copies which he thought to be obscene. He made arrangements with the printer and his attorney for the next copy which was furnished to the printer to be delivered to his agents. He obtained this copy on the assumption that it was obscene and that his action and the action of those acting under his direction, including the Director of the Iowa Bureau of Criminal Investigation and agents of the Bureau, who were alerted by the attorney for the printer as to when the copy would be available, was pursuant to the performance of their duties under the Iowa statutes.[1] Defendants included Richard C. Turner, the

[1] See §§ 725.4, 725.5 and 725.6, Code of Iowa, prohibiting the printing, distribution or circulation of obscene books, pamphlets, papers, pictures or other obscene matter. See also § 748.6, Code of Iowa, authorizing the attorney general to call to his aid in the enforcement of the law any peace officer, and § 80.22 authorizing the commissioner of public safety to assign as many as six officers to the department of justice when requisitioned by the attorney general, and providing that "when so assigned such officers shall be under the exclusive direction and control of the attorney general."

Attorney General of Iowa; Douglas Carlson, one of his assistants; Robert C. Blair, Director of the Iowa Bureau of Criminal Investigation; and Daniel Mayer and Terry C. Johnson, agents of IBCI.

The complaint was filed on March 17, 1969 and on the following day defendants filed a motion to dismiss supported by affidavits. On March 19, 1969, the court set the date for a hearing on the preliminary injunction for March 25, 1969. On March 21, defendants filed a brief and affidavits in support of their motion to dismiss and supplemental motion to dismiss. On the hearing date, March 25, The Honorable Roy L. Stephenson permitted evidence to be taken orally by both parties and he treated defendants' motion as one for summary judgment. Thereafter the court filed its memorandum opinion and order which required a return of the materials to plaintiffs but refused to order a preliminary injunction on the ground that it was unnecessary and dismissed plaintiffs' claim for compensatory and exemplary damages. Judge Stephenson's opinion is reported as *Wilhelm v. Turner*, 298 F.Supp. 1335 (S.D. Iowa 1969). We affirm the judgment of the district court although our reasons differ in some respects from the reasons advanced in the memorandum opinion.

The Pterodactyl had been published intermittently for about a year, but the record is not clear as to exactly how many issues had been printed. The Attorney General had had a complaint from a county attorney relative to one of the issues, and he had read some previous issues and was convinced that the material was obscene. His office made arrangements with the printer and the latter's attorney to alert him when the next issue would be published and to deliver the copy to the state agents. This was done which promptly resulted in a demand for the return of the copy, and upon refusal this action ensued.

The Unlawful Seizure

Judge Stephenson held that the materials were seized by the agents of the Attorney General at his direction without a prior judicial determination as to their obscenity and that by reason thereof the plaintiffs were entitled to a prompt return of the materials. The view of the district court was based primarily on *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), in which case the Supreme Court ruled that an adversary determination of obscenity is a necessary prerequisite to seizure. In the *Kansas* case, there was a warrant issued authorizing the sheriff to seize all copies of certain books but the Supreme Court there said (378 U.S. at 210):

> "A seizure of all copies of the named titles is indeed more repressive than an injunction preventing further sale of the books. State regulation of obscenity must 'conform to procedures' that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.'"

The Court further said at 213:

> "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books."[2]

We have no difficulty in agreeing with Judge Stephenson in his holding that the warrantless but voluntary arrangement for procuring the copy constituted a seizure and in following the rule of *Kansas* requiring an adversary determination of obscenity as a necessary prerequisite thereto. The order requiring prompt return of the materials to plaintiffs was proper under the circumstances.

---

[2]The Supreme Court cited in support: *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Smith v. California*, 361 U.S. 147 (1959).

Judicial Immunity

The district court recognized that the doctrine of judicial immunity has long been applied to prosecuting attorneys and those associated with them in the discharge of their duties on the basis that they are quasi-judicial officers and should be afforded the same immunity as judges in order that they may act freely and fearlessly in the discharge of their important official functions, and further recognized that the doctrine of immunity of quasi-judicial officers such as prosecuting attorneys has not been modified by the Civil Rights Act. The primary position of the plaintiffs is that this general rule is not applicable here because the Attorney General acted prior to having seen the material seized and therefore was not engaged in a quasi-judicial function but were engaged in activities which were clearly investigative. The court found that the Attorney General and his staff must of necessity conduct investigations in carrying out their official duties, that they were acting within their jurisdiction in conducting the investigation in the case at hand, and that it is only when the Attorney General or his staff act clearly outside their jurisdiction that they lose their immunity. In accordance with these findings, the court dismissed the suit for damages against the Attorney General and his assistant. With regard to the Director of the State Bureau of Criminal Investigation and the agents of the Bureau, the court found that they were performing ministerial functions at the specific direction of the Attorney General and were therefore immune from suit for civil damages.

In their argument in opposition to the court's finding of immunity for the defendants, the plaintiffs specifically raise three questions. First, they suggest that the doctrine is not applicable in actions brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Second, assuming the applicability of the doctrine to the Civil Rights Act, they question the extent thereof in creating immunity for prosecutors. And finally, they question whether the action by the prosecutor

(Attorney General) in the instant case falls within the doctrine.

Plaintiffs suggest that the plain language of § 1983 makes the statute applicable to "every person."[3] We think that *Pierson v. Ray*, 386 U.S. 547 (1967), affords a complete answer to plaintiffs' first argument. *Pierson* involved the liability of local police officers and judges under § 1983 and the Court, speaking through Mr. Chief Justice Warren, held that the common-law doctrine of judicial immunity was not abolished by § 1983. At pages 553-555, the Court said:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' [Citing case.] It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear

---

[3]Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

"We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

With regard to immunity for police officers, the Court said in the *Pierson* case, *supra* (386 U.S. at 555, 557):

"The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. [Citations omitted.] A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.

* * *

"We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for

false arrest and imprisonment, is also available to them in the action under § 1983."

The Court also clarified its holding in *Monroe v. Pape*, 365 U.S. 167 (1961), stating that the *Monroe* case presented no question of immunity, that none was decided, and that the Court "in no way intimated that the defense of good faith and probable cause was foreclosed by the statute." (386 U.S. at 556.) To the same effect, see *Rhodes v. Meyer*, 334 F.2d 709 (8th Cir. 1964), where judges, prosecuting attorneys, law enforcement officers and prison officials were held to be immune from suit for damages under the Civil Rights Act.[4]

Next, it is argued that the doctrine of quasi-judicial immunity is an undue extension of the doctrine of judicial immunity and should not be utilized to include quasi-judicial officers such as public prosecutors as such a rule would be illogic and an unjustifiable extension of the doctrine.

Defendant Richard C. Turner, Attorney General of Iowa, is a part of the judicial department under Article V, Judicial Department, § 12, Constitution of Iowa. Additionally, the Attorney General was performing acts pursuant to his statu-

---

[4]We said in *Rhodes v. Meyer*, 334 F.2d 709, 718 (8th Cir. 1964):

"This court has also since made a survey of the cases citing Monroe to see what effect, if any, it may have on the traditional concepts of immunity. We find there is overwhelming support for the position that judicial immunity and its derivative quasi-judicial immunity have not been affected by Monroe. [Citations omitted.]

"Therefore, in light of our findings that the factual situations are essentially the same in Meyer and Van Steenberg as in Houston, and that the law in regard to those facts is the same, we affirm the district court's application of stare decisis. The court properly determined all defendants to be immune from actions such as that alleged, and plaintiff's complaints were properly dismissed for failure to state a claim upon which relief could be granted."

tory duties.[5] It has many times been held that the doctrine of immunity of quasi-judicial officers such as prosecuting attorneys has not been modified by § 1983. *Fanale v. Sheehy*, 385 F.2d 866 (2nd Cir. 1967); *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966); *Rhodes v. Meyer, supra*; *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963); *Phillips v. Nash*, 311 F.2d 513 (7th Cir. 1962); *Rhodes v. Houston*, 309 F.2d 959 (8th Cir. 1962); *Wise v. City of Chicago*, 308 F.2d 364 (7th Cir. 1962); *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961).

Finally, it is suggested that the reasonable rule to follow is that found in *Dodd v. Spokane County, Washington*, 393 F.2d 330 (9th Cir. 1968). Plaintiffs' arguments are premised on the assertion that the Attorney General's actions were in no way connected with his judicial duties and argue that this is true whether the court adopts the view in *Bauers v. Heisel, supra*, or *Dodd, supra*. In *Bauers*, the court said (361 F.2d at 589):

> " . . . [W]e believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary."[6]

---

[5]See § 13.2, Code of Iowa, and n.1 hereof.

[6]The opinion in *Bauers v. Heisel*, 361 F.2d 581, 589-590 (3rd Cir. 1966), states:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions . . . Analogy could support either conclusion, but we believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent . . .; his office is vested with a vast quantum of discretion which is necessary for the vindication of the public

In *Dodd*, the court held that if a prosecuting attorney was performing acts committed pursuant to his investigatory duties, then his role is substantially the same as that of a policeman or county sheriff in which case he has the same defense of good faith and probable cause. The court said in *Dodd, supra* at 335:

> "The defense of good faith and probable cause is available to defendant county sheriff and deputy sheriffs. [Citing case.] If they are not able to establish that defense they have no other immunity from suit under the Civil Rights Act, though of course plaintiff may not be able to prove that they engaged in the alleged acts.
>
> • • •
>
> "Defendants prosecuting attorney and deputy prosecuting attorney are immune from suit under the Civil Rights Act if the acts complained of were performed in connection with their quasi-judicial duties. On the other hand, if such acts were committed pursuant to their investigatory duties, then their role is substantially the same as that of policeman or county sheriffs, in which case they have the same defense as indicated above for the defendant county sheriff and deputy sheriffs. See Robichaud v. Ronan, 9 Cir., 351 F.2d 533, 536-538."

Even though we should depart from the rationale of the district court and adhere to that suggested by plaintiffs, we would still come to the conclusion that the court was correct in dismissing plaintiffs' complaint with respect to damages as the record here indisputably reflects that the Attorney General and those under him were acting in good

---

interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself . . . Prosecuting attorneys who have been sued under the Civil Rights Act, R.S. § 1979, have likewise been held immune. . . ."

faith and had probable cause for their actions. The record is not only devoid of any evidence of lack of good faith or probable cause, but there is specific evidence both in the affidavits attached to defendants' motion to dismiss and in the testimony of the Attorney General who was called by plaintiffs as an adverse witness that (1) the Attorney General had never seen the plaintiffs prior to the trial, (2) he had no malice towards them, (3) he considered it his duty to enforce the obscenity laws of Iowa, (4) he had probable cause for his actions, and (5) his actions and the things which he directed others to do were done in good faith and pursuant to his official duties.

The trial court treated defendants' motion to dismiss as a motion for summary judgment and permitted testimony to be adduced at the conclusion of which the court inquired of the parties if they desired to submit other evidence and none was offered. There was not a scintilla of evidence offered by plaintiffs to refute the affidavits and evidence submitted in support of the motion to dismiss that would have justified the court in concluding other than that the Attorney General and those acting pursuant to his direc-

tions acted with probable cause and in good faith. *Cf. Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964).[7] With the record in this state, we need not determine whether our previous holdings should be modified to comport with the Ninth Circuit approach inasmuch as under any approach the law is settled that when the Attorney General, his assistants and those acting under him, acted with probable cause and in good faith they are immune whether their actions constituted an investigative procedure or not.

The judgment of the district court is affirmed.

---

[7]In *Norton v. McShane*, 332 F.2d 855, 861 (5th Cir. 1964), the court said:

> "In the face of the Attorney General's affidavit, the plaintiffs cannot rest upon the mere allegations of their complaints unsupported by sworn testimony. It became incumbent on the plaintiffs, by affidavits or otherwise as provided in Rule 56, supra, to set forth specific facts showing that there was a genuine issue for trial as to whether the defendants were acting within the line and scope of their official duties. See Cunningham v. Securities Investment Company, 5 Cir. 1960, 278 F.2d 600, 602, 603. The plaintiffs introduced no evidence whatever, and thus failed completely to meet the burden resting upon them."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	6

CITATIONS

Cases:

Bantam Books v. Sullivan, 372 U.S. 58, p. 70; 83 S. Ct. 631, p. 639; 9 L. Ed.2d 649, p. 593	4
Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L.Ed.2d 1469	4
Tinker v. Des Moines, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed 2d 731	4
Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L.Ed.2d 649	4
Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576	5
Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312	6
A Quantity of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed.2d 809	3, 4, 5
Davis v. United States, 413 F.2d 1226 (C.A. 5)	5
Sartain v. United States, 303 F.2d 859 (C.A. 9)	5
United States v. Eldridge, 302 F.2d 463 (C.A. 4)	5
United States v. Haden, 397 F.2d 460 (C.A. 7)	5, 6
United States v. Mazzella, 295 F.Supp. 1033 (S.D. N.Y.)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 766

RICHARD C. TURNER, Attorney General of Iowa; DOUGLAS CARLSON, Assistant Attorney General; ROBERT C. BLAIR, Director, Iowa Bureau of Criminal Investigation; DANIEL MAYER, TERRY C. JOHNSON, Agents,

Petitioners,

v.

HENRY WILHELM and LAWRENCE FRANK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTION PRESENTED

Whether the arrangement by which Petitioners came into possession of Respondents' copy materials constituted an unreasonable seizure requiring an adversary determination of obscenity as a prerequisite thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Respondents were the editors and publishers of an underground newspaper known as "Pterodactyl", distributed largely to college persons at Grinnell College at Grinnell, Iowa. Printing of several issues of the newspaper had been done by Trico Publishers, Inc., of Wilton Junction, Iowa. Sometime around the 2nd of March, 1969, Petitioner Carlson, an Assistant Attorney General for the State of Iowa, approached the printer, stated the publication was under investigation and requested to be notified when the next issue was to be printed. The printer called his attorney, who contacted Petitioner Turner, the Attorney General for the State of Iowa, and agreed to alert Turner when the next issue was to be printed. Respondents made arrangements to deliver their copy materials to be printed on the 13th day of March, 1969. This information was relayed to Turner by the printer's attorney. On March 12, 1969, Petitioners Mayer and Johnson, agents of the Iowa Bureau of Criminal Investigation, acting at the request of Turner, through his assistants, presented the printer with a letter requesting the printer to turn over the copy materials to them on the 13th day of March. The letter was signed by Petitioner Carlson. The printer agreed to pretend to Respondents that he was going to print the newspaper as scheduled, secure possession of Respondents' materials, then to deliver them into the hands of Petitioners. The operation went like clockwork. The unsuspecting Respondents delivered the materials to the printer, who then surrendered them to the state agents. The state agents promptly removed the materials to Des Moines, Iowa, where they were photographed and held as "evidence." Respondents' protests and

requests for immediate return of the materials were ignored, as were their claims of prepublication copyright. No search warrant was ever secured; no prior judicial determination of obscenity was had; Respondents' permission for the seizures was not sought or granted; and no criminal charges based on the allegedly obscene materials were ever filed. Respondents filed suit in the United States District Court requesting immediate return of the seized materials and praying for actual and punitive damages. Upon hearing on Petitioners' Motion to Dismiss, the Court found that the arrangement by which Petitioners came into possession of Respondents' copy materials was an illegal seizure, citing *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed.2d 809. The damage suit was dismissed with a finding that Petitioners were within the doctrine of quasi-judicial immunity. The copy was ordered returned and the newspaper was subsequently printed. Both sides appealed to the Circuit Court of Appeals, which upheld the order for the return of the materials. The Court also upheld the dismissal of the damage suit on the grounds Petitioners were acting in good faith. The Circuit Court did not reach the question of quasi-judicial immunity.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners allege the decision below is contrary to decisions in the Fourth, Fifth, Seventh and Ninth Circuits. The cases cited in support of that allegation, however, are entirely inappropriate; without exception those cases are criminal appeals in each of which the convicted person claims that incriminating evidence was admitted against him in violation of his Fourth Amendment rights. The instant case is civil and equitable, not criminal; and it involves materials jealously protected by the First Amendment. Those materials are neither contraband nor evidence, never having been adjudicated obscene. Petitioners, therefore, had no right of pos-

session in the materials and the District Court properly ordered they be returned to their rightful owners, the Respondents. That order was based on the equitable powers of the Court granted by the statute involved, 42 USC, 1983.

It is Respondents' position that Petitioners have grossly misstated the issue herein so as to ignore obvious First and Fourteenth Amendment aspects of the case.

The Court has previously recognized the favored position of First Amendment rights and the "heavy presumption" against the constitutionality of prior restraints of those rights. *Bantam Books v. Sullivan*, 372 U.S. 58, p. 70; 83 S. Ct. 631, p. 639; 9 L.Ed.2d 584, p. 593. There can be no denying that Petitioners' action herein constituted a prior restraint. They attempt, however, to remove this case from its proper First Amendment context by proposing that this Court's ruling in the *Kansas* case applies only to situations involving an illegal seizure, and, further, that no seizure occurred in this instance. (Footnote, p. 6 of the Petition.) Respondents deny both propositions.

The *Kansas* case addresses itself to procedures other than seizures:

> "We conclude that the procedures followed in issuing the warrant for the seizure of the books and authorizing their impounding pending hearing, were constitutionally insufficient because they did not adequately safeguard against the suppression of nonobscene books." (378 U.S. at 208, 84 S. Ct. at 1724, 12 L.Ed.2d at 811.)

This Court based that decision in part upon its holding in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S. Ct. 1325, 1 L.Ed.2d 1469, in which an injunctive procedure was upheld. This Court has since struck down unreasonable school regulation of First Amendment rights. *Tinker v. Des Moines*, 393 U.S. 503, 89 S. Ct. 733, 21 2 Ed.2d 731, and censorship statutes which do not provide procedural safeguards (*Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct . 734, 13 L.Ed.2d 649). It seems clear from these precedents that

the lower Court's decisions in this matter do not hinge on the finding of a seizure, but, rather, on the lack of procedural due process in impounding the Respondents' copy materials, thereby preventing publication of the newspaper.

In support of its notion that no seizure occurred, Petitioners rely on the following Fourth Amendment cases: *Davis v. United States*, 413 F.2d 1226 (C.A. 5); *Sartain v. United States*, 303 F.2d 859 (C.A. 9); *United States v. Eldridge*, 302 F.2d 463 (C.A. 4); *United States v. Haden*, 397 F.2d (C.A. 7); *United States v. Mazzella*, 295 F. Supp. 1033 (S.D. N.Y.).

Three of these cases are contrary to Petitioners contention. In *Eldridge*, *Mazzella* and *Sartain*, the Courts specifically found that *searches* occurred, but were rendered reasonably by the consent of the bailees in possession of the incriminating evidence. In *Davis*, the Court held that recording of an incriminating telephone conversation was not a *search*. No issue of *seizure* was presented.

Haden appears to be the most formidable of Petitioners' cases. The Court held therein that no seizure occurred when an undercover government agent (not merely a bailee) took illegal drugs from defendant's car at the direction of the defendant. The Court cited *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576:

> "One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from government intrusion unauthorized by warrant or well-defined special circumstances."

The record herein reveals that the materials were delivered to the printer only to be printed, under an agreement which had been in force for several prior issues. Upon learning of the printer's duplicity, Respondents immediately protested and demanded the return of the materials, asserting their prepublication copyright. These facts support the lower Court's findings in this case in that Respondents intended the privacy of the transaction and took reasonable steps under the circumstances to assure it. The violation by Peti-

tioners of Respondents' expectations of privacy in their dealing with their printer and the resulting impounding of their copy materials constituted a seizure under the *Haden* rationale.

This Court has held that each case involving the question of illegal seizure be judged on its own particular facts. (*Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424, 17 L.Ed.2d 312.) We submit the facts in the instant case are entirely different from those in the cases cited by Petitioners, that the issue presented is other than as framed by Petitioners and that no split of authority is created by the decision below.

II. THE DECISION BELOW PRESENTS NO PROBLEM TO LAW ENFORCEMENT OFFICERS ENGAGED IN THE LAWFUL GATHERING OF EVIDENCE.

Petitioners allege the holding below has caused a significant, widespread and deleterious effect on justice and the public by eliminating "another" common method of gathering evidence. They ignore completely the First Amendment aspects of this case and hope, thereby, to evade the clear requirements of the *Kansas* case.

CONCLUSION

For the reasons above stated, the Petitioners' Application for Writ of Certiorari should be denied.

Respectfully submitted,

CLARK L. HOLMES
910 Fleming Building
Des Moines, Iowa 50309

Attorney for Respondents